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No. 6 Original

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STATE OF CALIFORNIA

BRIEF OF THE STATE OF CALIFORNIA IN OPPOSITION TO MOTION TO STRIKE ANSWER

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 12, Original

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STATE OF CALIFORNIA

BRIEF OF THE STATE OF CALIFORNIA IN OPPOSITION TO MOTION TO STRIKE ANSWER

I

A Controversy Between Sovereigns Is Not Governed by Ordinary Rules of Pleadings and Practice. The Present Answer Is Proper, in View of the Nature of the Case.

In view of the nature of the present controversy, it is submitted that the answer filed by the State of California is proper in its entirety and should not be stricken. The motion of counsel for plaintiff seems to be predicated on the assumption that this is an ordinary law suit between individuals. But the controversy is, in its essence, political rather than judicial. It is a "quasi-international controversy"[1] between sovereigns. It is justiciable in this Court

[1] *Virginia* v. *West Virginia*, 220 U. S. 1, at p. 27.

only by virtue of "the exceptional grant of power conferred upon it by the Constitution. * * "[2] "And in a case like the present, the most liberal principles of practice and pleading ought, unquestionably, to be adopted in order to enable both parties to present their respective claims in their full strength."[3]

Counsel for plaintiff have referred to the fact that this Court has not adopted any rules of practice specifically applicable to original proceedings. The decisions of this Court in controversies between States indicate that the reason the Court has never adopted specific rules to govern original proceedings is that proceedings in which sovereigns are involved are not really law suits, in the usual sense of the term, and formal rules of practice would not be applicable to such controversies. Even the rule which formerly referred to the English Chancery Practice "as affording outlines for the practice of this court" was repealed in 1939. The reason for its repeal was no doubt because the general "principles of practice and pleading" in cases between sovereigns had been long established by a consistent line of court decisions. For example, in the early case of *Florida* v. *Georgia*, 17 How. 478, at p. 491, this Court said that the established forms and usages in courts of common law and equity "could not govern a case where a sovereign state was a party defendant." Such forms and usages, the Court said, "furnished analogies, but nothing more. And it became, therefore, the duty of the court to mould its proceedings for itself, in the manner that would best attain the ends of justice, and enable it to exercise conveniently the power conferred. And in doing this, it was, without doubt, one of its first objects to disengage them from all unnecessary technicalities and niceties, and to conduct the proceed-

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[2] *Virginia* v. *West Virginia*, 234 U. S. 117, at p. 121.

[3] *Rhode Island* v. *Massachusetts*, 14 Pet. 210, at p. 256.

ings in the simplest form in which the ends of justice could be attained."

The present answer was prepared in a definite attempt to follow the precedents laid down in the decided cases and in the belief that the ends of justice in a controversy between sovereigns could best be attained by presenting the claims of the State of California "in their full strength."[4] It was not supposed that counsel for the United States would resort to those technical maneuvers over the propriety of the pleadings which are usually adopted only in suits between individuals.

It is believed that the decision to be rendered herein is of the gravest importance to every State in the Union and to their respective grantees and lessees, and to innumerable cities, counties, harbor districts, port authorities and individuals. Counsel's assertion that only the lands underlying the three-mile belt are in issue herein is true only in the sense that the land selected for litigation in the present case lies within this belt. But the principle underlying title acquired by California and all other States by virtue of their sovereignty is under attack. No basis in law or reason has been advanced for a distinction as to ownership between lands underlying the three-mile belt and those which underlie "inland" navigable waters. Of the many decisions holding the respective States to be the owners of the lands underlying their navigable waters, not one was predicated upon the circumstance that the waters involved were "inland." On the contrary, all were predicated upon the fact that the waters in question were "navigable waters" within the State's boundary.

It has seemed to counsel for the State of California that a case of such magnitude and importance as this ought not to be decided otherwise than in the light of all facts and circumstances in the nation's history which in any tenable

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[4] See Section V, *infra*, and references set forth therein.

view of law or reason are relevant and material thereto. In this view of the case, the facts that the national government by a uniform course of conduct throughout a period of some ninety years, and by each of its three great departments, judicial, executive and legislative, has acknowledged and declared that the several States are respectively the owners of the lands underlying the navigable waters within their boundaries, are both relevant and material to the determination of the ultimate issue. Likewise, it seemed that the facts that during the past hundred years the several States and their respective grantees, lessees and agencies have expended huge sums of money in the development and improvement of lands underlying their navigable waters, in justified reliance upon the representations (by acts, declarations, admissions and conduct) of the national government that it made no claim to the ownership of lands underlying navigable waters within the boundaries of the respective States, are also relevant and material.

It was believed that, under these circumstances, this Court would not wish to decide this case *in vacuo*, as seems to be the desire of Government counsel. Accordingly, it was deemed proper to present to the Court and opposing counsel in the answer as complete a picture of the entire case and of the State's theory in relation thereto as was practicable.

The answer is long simply because the amount of relevant material is very great. We believe all this material is proper and necessary to a fair presentation of the State's case. It is true that the answer contains much evidentiary matter and some conclusions of law and of fact. The evidentiary matter is believed to be relevant rather than "of only colorable relevance."[5] Indeed, as we shall show later

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[5] It is to be noted that the motion herein is not predicated on irrelevancy or immateriality.

herein, such evidentiary matter and such conclusions as we have pleaded are proper even under conventional rules of pleading which require that equitable defenses must be pleaded in detail.

It is submitted that the issues tendered by the complaint are joined in the answer as directly as is possible in view of the uncertainties and ambiguities in the complaint; and that the affirmative defenses are so pleaded that it is neither "virtually impossible" nor excessively difficult to determine the issues intended to be tendered thereby.

Because of the belief that the parties to this "quasi-international controversy" are not governed in the presentation of their respective claims by the rules applicable to private litigants in an ordinary lawsuit, the defendant refrained from excepting to the uncertainties and ambiguities in the allegations of the complaint—though it scarcely will be denied that the issues tendered thereby are not framed with definiteness and precision.[6]

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[6] For example: Does plaintiff claim to be the owner in fee simple of the lands referred to, or merely to be "possessed of paramount rights in and powers over" those lands?

What kind of "paramount rights" and what sort of "powers" are claimed to be "possessed" by plaintiff?

Referring to the allegation, "at all times herein material plaintiff was and now is the owner * * *",—what times are deemed by plaintiff's counsel to be "material"? Stated otherwise,—when, from whom, and by what means did plaintiff acquire the ownership or possession which it now asserts?

What is meant by "inland waters"? Stated otherwise,—where is the landward boundary of the lands claimed herein, in its application, for example, to Santa Monica Bay, as defined in *People* v. *Stralla* (1939), 14 Cal. (2d) 617, 96 Pac. (2d) 941, or in its application to San Pedro Bay, as defined in *United States* v. *Carrillo* (1935), 13 F. Supp. 121.

Does plaintiff claim title to lands within ports or harbors which are constructed on the seacoast by means of artificial breakwaters built out into the open sea?

There is like uncertainty as to the seaward boundary of the lands claimed herein. Does the phrase, "extending seaward three nautical miles," mean three nautical miles seaward from the "ordinary low watr mark," or three nautical miles "outside of the inland waters"?

Notwithstanding the uncertainties and ambiguities in the allegations of the complaint, the defendant has traversed them, adequately and completely, by the allegation in Paragraph I of the answer (p. 1) that "The State of California * * * is the owner in fee simple of all lands underlying all navigable waters within the boundaries of the State * * *," except such portions as have been granted by the State or by a prior sovereign or have been taken by condemnation.

Following that allegation, defendant set forth in detail a series of affirmative defenses showing the historical and legal basis of its claim of ownership and the long history of acts of recognition and acquiescence by the Federal Government in the State's title. It would seem that this procedure should be helpful both to the Court and to opposing counsel. Instead of leaving this case "in such a state of obfuscation that it becomes virtually impossible to plan the future conduct of this litigation," it has aided opposing counsel by informing them in advance of the precise contentions which they will be called upon to meet. Counsel for defendant would indeed be happy if plaintiff's counsel would follow a like course and disclose in advance the historical and legal basis, if any, of their claims of ownership or possession.

It is submitted, therefore, that in view of the character of this litigation and of the fact that no definite rules exist which govern the practice and pleading in such cases, a sovereign State should not be subjected to the penalty of having its entire answer stricken, solely because it has stated its case in detail and has set forth in full all matters of fact and law which its counsel believed to be necessary to protect the rights of its people and to inform the Court and opposing counsel of all its intended defenses.

II

Even Under Conventional Rules of Pleading, All or Substantially All the Answer Is Proper

1. Federal Rules of Civil Procedure

Although conceding that there are no applicable rules, counsel for plaintiff assert that the Federal Rules of Civil Procedure

> "nevertheless furnish a sound guide for all proceedings throughout the Federal judicial system."[7]

(a) *Affirmative defenses must be specifically pleaded.*

If the Federal Rules of Civil Procedure be deemed to furnish a guide, the one rule which bears most directly upon the present answer is Rule 8(c), which counsel for plaintiff fail to mention. This rule reads, in part, as follows:

> "Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, *estoppel,* failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, *release, res judicata,* statute of frauds, statute of limitations, *waiver, and any other matter constituting an avoidance or affirmative defense.*"

This rule is merely a continuation of the long-settled and axiomatic principles of pleading, that all "affirmative defenses must be specifically pleaded" with a full state-of facts constituting such defense;[8] and that "matter con-

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[7] Memorandum in Support of Motion to Strike, p. 8.

[8] 21 *Standard Encyclopedia of Procedure, "Quieting Title,"* p. 1017.

stituting an equitable defense is new matter, and must be pleaded."[9]

(b) *In an action involving title to real property it is proper for a party to plead his "chain of title."*

It is universally recognized as proper pleading in a suit involving title to real property for a party to plead in detail the facts upon which his claim of title rests. In many States the practice is to attach to the pleading a detailed "chain" or "abstract" of title.[10]

In a suit "to remove a particular cloud from the plaintiff's title" this Court held:

> "It hardly requires statement that in such cases the facts showing the plaintiff's title * * * are essential parts of the plaintiff's cause of action."[11]

It follows, by parity of reasoning, that the facts showing defendant's title are essential parts of its defense.

(c) *The foregoing principles of pleading are peculiarly applicable to the present case.*

The first twelve pages of the answer consist of admissions and denials of the allegations contained in the complaint. Following these, commencing with page 13, are a

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[9] 1 *Encyclopedia of Pleading and Practice*, p. 837. Accord: *Western Casualty & Surety Co.* v. *Beverforden* (C. C. A. 8th, 1937), 93 F. (2d) 166, 169; *Gilmer* v. *Poindexter*, 10 How. 256, 267; *Philadelphia Wilmington & Baltimore R. R. Co.* v. *Howard*, 13 How. 307, 334-335.

[10] This practice was approved in *King* v. *Southern Railway Co.* (C. C. Ga. 1902), 119 Fed. 1017. See, also, 7 *Standard Encyclopedia of Procedure* 1040; 19 C. J. 1111.

[11] *Hopkins* v. *Walker*, 244 U. S. 486, 490.

Accord: *United States* v. *Standard Oil Co. of Calif.* (D. C. Cal. 1937) 20 F. Supp. 427, affirmed (C. C. A. 9th) 107 F. (2d) 402; 21 *Standard Encyclopedia of Procedure*, p. 1013, Note 5(a); *Stark* v. *Hoeft*, (1928) 205 Cal. 102, 107, 269 Pac. 1105, 1107; *Stacey* v. *Jones* (Ala. 1912) 60 So. 823, 824; *Bledsoe* v. *Price* (Ala. 1902), 32 So. 325, 326; 51 C. J. p. 219; 19 C. J. 1110.

series of seven affirmative defenses, all of which deal either with the source and basis of defendant's claim of title or with the facts which constitute long usage, recognition, acquiescence, estoppel, *res judicata* and kindred defenses.

The first affirmative defense (pp. 13-16) alleges that the State of California is the owner in fee simple of all the lands under navigable waters within the State's boundaries. This is followed by a detailed statement of facts which, in a suit between private individuals, would be equivalent to the "chain of title" leading to the defendant. But the title of a State to lands held by virtue of its sovereignty is not derived from a patent and a series of mesne conveyances, as is usually the case with private individuals. It is predicated on a combination of matters—legal, historical and factual—all of which must be stated in order to show the source and basis of title in the case of a sovereign state. The matters thus pleaded include legal, historical and factual data regarding:

1. The rights of the English Crown under the common law.
2. The rights of the thirteen colonies and the facts relating to the colonial grants.
3. The rights acquired by the original thirteen states when they became independent.
4. The rights of new states under the doctrine that new states are admitted on equal footing with the original states and the origin, meaning and application of that doctrine.

The above illustrates that conventional rules of pleading do not fit a case like the present one. However, insofar as conventional rules of pleading can be said to furnish a guide, it is believed the present form of pleading is proper and necessary and that the combination of historical, legal and factual matter pleaded is no more than the equivalent of the chain of title in a case between individuals.

The second affirmative defense (p. 89) consists of "recognitions, assertions, determinations, adjudications and acquiescences on the part of the United States that title and ownership in and to all tide and submerged lands is in the respective States, including the State of California."

It is quite true that among the instances of recognition and acquiescence are included examples of lands at Oakland, California, within San Francisco Bay, and also within other ports and harbors, as well as in the open sea. The reason for this is, as has already been indicated, that it is believed no legal basis exists for the alleged distinction between land beneath "inland waters" and lands underlying the three-mile belt. Indeed, counsel concede in their Statement in Support of Motion to File Complaint herein that there are no decisions which make any such distinction, and none have been cited. Furthermore, in said Statement counsel say that the territory out of which California was created originally "belonged to the United States, having been acquired from Mexico," and that

> "Upon admission of California to the Union, the State of course became endowed with all rights and power necessary for state sovereignty. But it did not succeed to any public lands or property of the United States, in the absence of any grant from Congress." [12]

If the absence of an express grant from Congress (in some form other than the Acts of Admission) is the basis of plaintiff's case, then its claim presents a challenge not only to lands underlying the three-mile belt but to all lands underlying inland navigable waters, both salt and fresh, and to lands between high and low tide along the seashore, for Congress has never expressly granted lands of these types to any new State.

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[12] Statement in Support of Motion to File Complaint, pp. 3-4.

Plaintiff's case is, therefore, as was said at the outset, an attack on the underlying principle on which State titles have always been held to rest, namely, that *all* lands beneath navigable waters within a State's boundary vested in that State by virtue of its sovereignty, and that in the case of territory which "belonged" to the United States, all lands of this character were held by the United States only as trustee for the future states.

Since this principle is under attack, and since no legal distinction has been shown to exist between lands below inland waters and lands underlying the three-mile belt, examples of acquiescence and recognition of State titles of inland waters constitute pertinent facts in the present case. And under the rules of pleading above mentioned, every instance of such recognition and acquiescence which defendant desires to prove should be specifically pleaded.

There are further reasons for the recital of facts relating to lands within bays, harbors or inland waters. One is that there is no settled legal definition of what constitutes a bay, harbor or inland water, and it is impossible to ascertain from plaintiff's complaint what its claims will be in that regard. There is wide divergence of authority in different parts of the country as to whether a particular indentation in the coast line is a bay or part of the open sea. In the absence of any precise definition as to the meaning of "bays, harbors and inland waters," defendant has had no alternative but to plead the facts as to all submerged lands within its boundaries.

A still further reason for the recital of facts as to lands within bays, harbors and inland waters is specifically set forth in the fourth affirmative defense (p. 818), in which it is alleged that no distinction has ever been attempted or suggested by the United States, until a few months ago, between lands below bays, harbors and inland waters, on

the one hand, and lands along the open coast below the line of ordinary low water. All the allegations of the second affirmative defense are incorporated by reference into the fourth affirmative defense as showing that all lands beneath navigable waters, whether inland or on the open coast, have been considered and dealt with in the same identical manner and that as to all such lands, the Federal Government has acquiesced in and recognized the title of the State of California.

The third affirmative defense (p. 740) alleges that the State of California has, throughout its history, acted in reliance upon the recognition by the United States of the State's title to all lands under navigable waters within its boundaries and has expended huge sums of money and made numerous grants in reliance upon such recognition. This is part of the broader showing made by the entire answer of acquiescence, recognition, long usage and estoppel, and is necessary in order to show how and to what extent the State has relied and changed its position, upon the representations and acts of the plaintiff.

The fifth affirmative defense (p. 819) deals with a specific claim of *res judicata*. The sixth and seventh affirmative defenses incorporate the allegations of the first, second and third affirmative defenses by reference. The fourth to seventh affirmative defenses, inclusive, occupy five pages of the answer.

(d) *The uncertainty as to the theory of plaintiff's case requires the pleading by defendant of factual and historical matter regarding States other than California.*

Plaintiff has objected specifically [13] to the inclusion in the answer of instances of Federal recognition of titles of

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[13] Memorandum in Support of Motion to Strike, p. 2.

twenty-five States other than California. It is believed that this was entirely proper under the rule previously mentioned requiring that affirmative defenses be specifically pleaded. However, it should be pointed out that this pleading is also necessary to meet one of the possible theories of plaintiff's complaint.

It is impossible for defendant to determine whether it is the theory of plaintiff's case that California stands on a basis different from and less favorable than other States of the Union. Mention has already been made of the statement by plaintiff's counsel that the territory out of which California was created was acquired by the United States from Mexico and that

> "Upon admission of California to the Union, the State of course became endowed with all rights and power necessary for state sovereignty. But it did not succeed to any public lands or property of the United States, in the absence of any grant from Congress." [14]

These assertions suggest the possibility that plaintiff may intend to claim that California is not on an equal footing with other States in regard to ownership of all or some part of its submerged lands.

On the other hand, plaintiff apparently recognizes that California is on an equal footing with the original thirteen states. On this question plaintiff's counsel say:

> "At the time of the formation of the Union the first thirteen states did not own the lands underlying the three-mile belt, and the entire basis of the foregoing decisions, implying a grant to the new states in order to place them on an equal footing with the old, is therefore absent here." [15]

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[14] Statement in Support of Motion for Leave to File Complaint, p. 3.

[15] Statement in Support of Motion for Leave to File Complaint, p. 4.

This statement seems to imply that plaintiff concedes that all States are on an equal footing so far as the ownership of all submerged lands is concerned.

As it was impossible for defendant to determine upon which of the above theories plaintiff intended to rely, defendant was under the necessity of pleading affirmative defenses which would meet both theories.

To meet the possible claim that California is not on an equality with other States and did not acquire all submerged lands within its boundaries upon its admission to the Union, defendant has set forth the historical facts relating to (1) the organization of the State, (2) its admission to the Union, (3) the making of the compact that California shall be on an equal footing with the original states, (4) the origin and past application of the phrase "on an equal footing," and other kindred matters.

To meet the claim that the original states did not own the lands within the three-mile belt and hence California, even if it be on an equal footing, does not own such lands, it was necessary, as above stated, to set forth the colonial charters and other facts showing the origin and basis of the title of the original states.

If it shall be established that the original thirteen states did own the lands underlying the three-mile belt, then it will follow, under the equality rule, that California likewise owns its coastal lands within the three-mile belt. On this theory the title of the original thirteen states would be directly in issue in the present case and the facts as to the recognition by the Federal Government of the title of those states are material and necessary to defendant's case.

Furthermore, if all new states, including California, were admitted to the Union on an equal footing with the original states, then it must follow that acquiescence in and recognition by the Federal Government of the title of the original

states, or of any other states subsequently admitted, to their submerged lands would be material and relevant as an implied recognition of the title of California.

For these reasons all of the historical matter pleaded in the first affirmative defense and all of the facts pleaded in the second affirmative defense which relate to the acquiescence and recognition by the Federal Government of the title of twenty-five States and Alaska are pertinent and material in order to meet the possible claims which appear to be involved in plaintiff's case.

It is submitted, therefore, that, considering the nature of the case, the answer in its entirety is wholly within the spirit and intent of Rule 8(c) of the Federal Rules of Civil Procedure and of the principles governing the pleading of affirmative defenses, which are codified and recognized by that rule.

2. Former Practice in the English Court of Chancery

If it be assumed that, despite the change in Rule 5, "former practice" in the English Courts of Chancery still affords outlines of practice in original proceedings in this Court, it will be found that plaintiff's motion does not comply with these rules and that defendant's answer does not violate them in any substantial particular.

(a) *Plaintiff's motion does not comply with the rules of Chancery practice.*

The former practice in the English Court of Chancery did not permit objections to an answer to be made by motion or demurrer but only by written exceptions.[16]

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[16] *Barrett* v. *Twin City Power Co.* (1901), 111 Fed. 45; 1 Daniell, *Chancery Pleading and Practice* (6th ed.), pp. 349, 753, note (a); *Story's Equity Pleading* (10th ed., 1884) p. 256, note a; 1 Beach, *Modern Equity Practice* (1894 ed.), pp. 425, 437, 439, 441; Hinde, *The Modern Practice of the High Court of Chancery* (1786), p. 259.

By an Act of Parliament in 1852 impertinence (including surplusage and prolixity) in an answer was abolished as ground of objections by exception, the remedy therefor being exclusively a matter of costs. 15 & 16 Vict., Chap. 86, Par. VII (July 1, 1852) provided that:

> "The practice of excepting to bills, answers and other proceedings in the said court [of chancery] for impertinence shall be and the same is hereby abolished: Provided always, that it shall be lawful for the court to direct the costs occasioned by any impertinent matter introduced into any proceeding in the same court to be paid by the party introducing the same, upon application being made to the court for that purpose." [17]

It is assumed that the "former practice" in Chancery referred to the practice as it existed prior to 1842.[18] Nevertheless, the statute of 1852 shows the tendency of English Chancery practice to regard impertinence in a pleading as a matter to be dealt with by imposing costs on the pleader, rather than by exceptions.

If in the present case the motion to strike be treated as the equivalent of written exceptions under the rule of Chancery practice, and if it be assumed that (notwithstanding the Act of 1852) the objections on the ground of impertinence could be made other than as a matter of costs, and if it be assumed that impertinence is one of the grounds of the motion, though not so specified (without conceding the validity of the foregoing assumptions), still the requirements of Chancery practice were and are that *plaintiff must designate the particular portions of the answer to which it objects.*

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[17] The effect of this Act may have been modified by subsequent orders of the Court of Chancery, see Order XIX, Rule 27, Hopkins, *Federal Equity Rules Annotated* (8th ed.) p. 167.

[18] Note by the Court in 114 U. S. 112.

The rule is that

> "Exceptions to an answer must be definite and exact, and cannot be founded on general objections to an answer part of which is clearly good." [19]

It is likewise the settled rule in Chancery practice that

> "One exception cannot be partially allowed, and therefore if part of an exception be good, and the rest bad, the whole exception must be overruled." [20]

It is of course recognized that where defective portions of a pleading are so inextricably intertwined with the relevant and proper portions that it is impossible to segregate them, the entire pleading may be subject to objection. However, an examination of the answer in the present case will show that, far from being impossible, it would be quite simple for plaintiff to designate those portions of defendant's answer to which it objects.

The thesis of each affirmative defense is set forth with definiteness in the opening paragraph or paragraphs thereof. The facts pleaded in each affirmative defense are organized under appropriate classifications and subject headings, and each piece of factual or historical data is treated separately in a numbered paragraph under its appropriate head. There is a carefully prepared and complete table of contents which renders it quite simple for even a casual reader to see at once the nature of each fact or other matter affirmatively pleaded.

In reality, it would appear that counsel's main objection is that they should not be confronted with what they call

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[19] Daniell's *Chancery Pleading and Practice* (6th ed.), p. 753, note (a). Accord: *Craven* v. *Wright* (1723), 2 P. Wms. 181, 24 Eng. Rep. 691; Smith's *Chancery Practice* (1837), pp. 571-572.

[20] 1 Daniell's *Chancery Pleading and Practice* (1845 ed.) p. 270, (1837 ed.) p. 457.

Accord: *Mound City Co.* v. *Castleman* (C. C. Mo., 1909), 171 Fed. 520, 523.

"the burden" of attempting to segregate the "relevant" from the alleged "irrelevant" matter in the answer.[21]

Counsel have instituted a suit which attacks the title to real estate of untold value and which casts a cloud on titles to improved and unimproved real property in every State in the Union which contains navigable waters. It is respectfully submitted that counsel should, at the very least, be required to take the trouble to read the State's answer and to specify what parts of it they deem objectionable and the particular grounds of objection thereto.

(b) *None of the allegations of the answer are impertinent or otherwise improper, in view of the nature of the controversy.*

The following authorities support the contention that the present answer does not violate Rules of Chancery Practice because of impertinence, prolixity, pleading documents, pleading matters of law, pleading facts of which the Court has judicial knowledge, or length of pleading:

(i) *Impertinence.*

"If the matter of an answer * * * can have any influence whatever in the decision of the suit in reference to any point to be considered in it, it is not impertinent."[22]

(ii) *Prolixity.*

"* * * but prolixity in setting forth important documents is not impertinence."[23]

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[21] Memorandum in Support of Motion to Strike Answer, p. 3. The motion, however, is *not* predicated upon "irrelevance" or immateriality.

[22] 1 Daniell's *Chancery Pleading and Practice* (6th ed.), p. 754, note 6.

[23] Smith's *Chancery Practice* (1837), p. 568.
Accord: *Lowe* v. *Williams* (1826), 2 Sim. & St. 574, 57 Eng. Rep. 465.

(iii) *Statutes and matters of law.*

"It is said that in equity it is permissible to set out matters of law as well as matters of fact constituting a defense." [24]

(iv) *Facts which the Court can judicially know.*

It has been held that

"(1) matters which the court can judicially know; (2) the extent, value, and importance of the express business in the United States, and the circumstances under which it has grown up and been transacted; (3) the usage and past conduct of railway companies in relation to the same; (4) the citation and quotation of acts of Congress concerning or recognizing the express business; and (5) the averments concerning prior injunctions allowed by the courts in similar cases."

are proper as against exceptions for impertinence. Regarding such matters, the Circuit Court said:

"It may be material to a suit and proper presentation of the plaintiff's case to allege the existence of facts within the judicial knowledge of the court, and, if so, they are pertinent thereto. The fact that they may be proved by reference to the judicial knowledge does not dispense with the averment of them, or render such averment impertinent." [25]

(v) *Mere length of a pleading.*

"It is a matter of importance to avoid unnecessary length; but it is of much more importance, in discussing a question of length or materiality, not to determine the

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[24] 30 C. J. S. 750.

Accord: *Matter of Lilley's Trustees* (1850), 17 Sim. 110, 60 Eng. Rep. 1069; *Farmers Loan & Trust Co.* v. *Northern Pacific R. Co.* (C. C. Wash., 1896), 76 Fed. 15, 16.

[25] *Wells* v. *Oregon R. & N. Co.* (C. C. Ore., 1883), 15 Fed. 561, 563.

Accord: 4 *Standard Encyclopedia of Procedure*, p. 169, citing *Farmers Loan & Trust Co.* v. *Northern Pacific R. Co.*, 76 Fed. 15; *Chapman* v. *School District*, 5 Fed. Cas. No. 2,607; *Mound City Co.* v. *Castleman*, 171 Fed. 520.

merits before the court has before it all that is material to the merits. * * *"[26]

(c) *The matters objected to constitute an aid and benefit to the Court, plaintiff and its counsel, rather than a disadvantage, and for that reason should not be stricken.*

No injury whatever has been occasioned plaintiff by the answer of the State of California filed herein. To the contrary, the substantial disclosure of the State's case, contained in its answer, is a direct benefit and aid to plaintiff and the Court. This being true, plaintiff's motion to strike should be denied.

This is the attitude which courts of equity have heretofore adopted with respect to objections to answers fully disclosing a defendant's case. For example, one equity court, in a similar case, stated that:

> "No injury, however, is done plaintiff by giving it the advantage of defendant's process in advance of the trial. It enables plaintiff to ascertain in advance * * * and no injury is done it. Therefore I am of opinion that the motion to strike the specific averments in the answer, as set out in the motion, should be overruled."[27]

Plaintiff's suggestion[28] that, if the matters objected to were not contained in the answer, "the Government would then be in a position to ask for judgment on the pleadings

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[26] *The Attorney General* v. *Rickards* (1843), 6 Beav. 444, 49 Eng. Rep. 897.

Accord: *Lowe* v. *Williams* (1826), 2 Sim. & St. 574, 57 Eng. Rep. 465.

[27] *Tennessee Products Corps* v. *Warner* (D. C. Tenn., 1929), 39 F. (2d) 200, 202; 57 F. (2d) 642, cert. den. 287 U. S. 632; where the court refused to strike portions of the answer under Equity Rules 21 and 30, simply "because the answer contains allegations which are argumentative and statements of evidence." The District Court added that: "I think the answer somewhat prolix. * * * It is true that defendant goes somewhat into detail in stating the process. * * * No injury, however, is done plaintiff. * * *"

[28] Memorandum in Support of Motion to Strike, p. 6.

or to consent to the reference of the case to a Master," is without merit. If the present motion to strike is granted, and a short form of answer is thereafter filed, and plaintiff thereafter files a motion for judgment on the pleadings, defendant would then necessarily have to ask the Court on such motion to take judicial notice of a substantial portion of the matter in the present answer. In order to have this matter in convenient form for the Court's consideration, counsel for defendant would no doubt find it essential to have the same matter again printed and presented for the Court's use on such motion for judgment on the pleadings. Hence, the answer in its present form is an obvious convenience to both the Court and counsel, rather than being any detriment or disadvantage, if it be assumed that plaintiff desires to have the case heard on a motion for judgment on the pleadings.

If, on the other hand, the case is to be referred to and tried by a Master, then the Master, as well as counsel for plaintiff, will be greatly aided by having before them, as in the present answer, the matters to be offered in evidence and those which will be considered by judicial notice.

It is apparent then that, rather than being injured or damaged by the form of the present answer, plaintiff, its counsel and the Court are, on the contrary, directly aided and benefited thereby.[29]

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[29] The statement of an Equity Judge in *Mound City Co.* v. *Castleman* (C. C. Mo., 1909), 171 Fed. 520, 521, 524, is equally applicable to the instant proceeding. It is there said that "* * * complainant has filed a most unusual number of exceptions for impertinency, going to almost every feature of the pleadings. Whether allowed or disallowed, as to many of them, would not control or affect the questions of law and fact which will ultimately determine the merits of this controversy * * * the court will again observe: As it is quite apparent that the ultimate determination of the rights of the parties in this controversy will unquestionably turn upon few controlling questions of law and fact, the complainant would best subserve his own interest, if he have a meritorious cause of complaint, by passing over these dilatory pleas and coming to a final issue."

(d) *All substantial doubts as to whether allegations of an answer are impertinent or not are to be resolved in favor of their pertinence.*[30]

The rule in equity is well established that the court will not expunge an answer or portions of an answer on the ground of impertinence unless the court is first satisfied that there is no substantial doubt as to the pertinency of the questioned allegations. The reason is obvious. If expunged, irreparable damage is done to the defendant if there is error in the order, while if not expunged, no serious injury occurs and the court can ultimately adjust the matter by assessment of costs.

> "Nor will the court, in cases of alleged impertinence, order the matter alleged to be impertinent to be struck out, unless in cases where the impertinence is very fully and clearly made out; for if it is erroneously struck out, the error is irremediable; but if it is not struck out, the court may set the matter right in point of costs."[31]

(e) *An answer by an attorney general, representing a sovereign, is not open to exceptions or motions on the grounds of impertinence or insufficiency.*

It was the rule in the Court of Chancery that an answer filed by the attorney general representing the sovereign could not be excepted to by the opposing party on the ground

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[30] Impertinence is not specified as one of the grounds of the present motion, but the rule that all substantial doubts must be resolved against a motion to strike applies here with equal force.

[31] Story, *Equity Pleading* (1884 ed.), p. 257.

Accord: 1 Beach, *Modern Equity Practice* (1894), p. 428; 1 Daniell, *Chancery Pleading and Practice* (6th ed.), p. 351, note 1; *Wells* v. *Oregon R. & N. Co.* (C. C. Ore., 1883), 15 Fed. 561, 564; *Davis* v. *Cripps* (1843), 2 Y. & C. C. C. 430, 63 Eng. Rep. 192; *United States* v. *McLaughlin* (C. C. Cal., 1885), 24 Fed. 823, 826.

that the answer was defective for impertinence or insufficiency.

> "Exceptions for insufficiency and for impertinence are held to be distinct. They do not lie to the answer of * * * the attorney general."[32]

III

The Effect of Plaintiff's Motion, If Granted, Would Be to Deprive Defendant of Its Day in Court

Plaintiff's counsel say[33] that if this case is referred to a Master to take evidence it will result in protracted hearings on the great multitude of evidentiary matters alleged in the answer.

On the other hand, counsel say, if an appropriate answer, raising clear-cut issues, were filed, the Government would be in a position to ask for judgment on the pleadings.

These arguments must be considered in the light of the fact that the motion to strike does not purport to test the legal sufficiency of the facts pleaded as defenses. Indeed, counsel admit that most of the evidence pleaded is of "colorable relevance." Yet counsel seek to have these allegations stricken out so they can move for judgment on the pleadings on "clear-cut issues," presumably of law only, in disregard of the facts which support defendant's title. In other words, it appears that the Government would like to debar California even from submitting its evidence to the Court or to a Master and having it determined whether or not the evidence is relevant and material. This would simply deprive the State of its day in court.

The very purpose of referring the matter to a Master is to enable defendant to submit the evidence which defendant

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[32] 1 Daniell, Chancery Pleading and Practice (6th ed.), p. 753, note (a); see also *id.* at p. 134.

[33] Memorandum in Support of Motion to Strike, p. 6.

believes is relevant. Whether such evidence is relevant is one of the matters to be decided after full hearing and argument.

The Government is apparently seeking to deprive California (and other States) of property of inestimable value without regard to the facts of history or long record of official acts of all Departments of the Federal Government recognizing State titles. It would, as was said, like to present the case to the Court *in vacuo*, on the basis of some theoretical doctrine of emerging property rights.[34]

But the title to real property under our law does not simply emerge. It must be predicated on something. And although plaintiff has failed to state in its complaint either the facts or the law upon which its asserted claim of title is based, it is believed that plaintiff must make out its case in the usual way by offering proof as to the origin and basis of its title, if any it has.

Defendant, on the other hand, has stated fully the facts on which the State's claim of title is predicated and the facts which constitute the Government's recognition and acquiescence in that title. These facts likewise must be offered in evidence and proved in the usual way if the State of California is to be accorded the elementary rights of every litigant. The answer does, therefore, raise triable issues of fact which may properly be heard before a Master in accordance with the prayer contained in the State's answer.

As above stated, plaintiff's motion does not test the relevance or legal sufficiency of the matters pleaded. Plaintiff does not attack the answer on those grounds, but only on the grounds of prolixity and the pleading of arguments, evidentiary matter and conclusions, which, counsel say, cannot be separated without great difficulty from the well-

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[34] Statement in Support of Motion for Leave to File Complaint, p. 4.

pleaded facts. We do not, therefore, present argument or authorities on the legal sufficiency of the answer. However, as to the propriety of pleading the detailed evidence of acquiescence and long usage we think the decision of this Court in the late case of *Arkansas* v. *Tennessee*, 310 U. S. 563 (1940) is pertinent. In that case the Court said (pp. 569-570):

> "The contentions of Arkansas in opposition to the application of the principle of prescription and acquiescence in determining the boundary between States cannot be sustained. That principle has had repeated recognition by this Court. In *Rhode Island* v. *Massachusetts*, 4 How. 591, 639, the Court said: 'No human transactions are unaffected by time. Its influence is seen on all things subject to change. * * * For the security of rights, whether of states or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be involved with greater justice and propriety than in a case of disputed boundary.' Applying this principle in *Indiana* v. *Kentucky*, 136 U. S. 479, 510, to the long acquiescence in the exercise by Kentucky of dominion and jurisdiction over the land there in controversy, the Court said: 'It is a principle of public law universally recognized, that long acquiescence in the possession of territory and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority.' Again, in *Louisiana* v. *Mississippi*, 202 U. S. 1, 53, the Court observed: 'The question is one of boundary, and this Court has many times held that, as between the States of the Union, long acquiescence in the assertion of a particular boundary and the exercise of dominion and sovereignty over the territory within it, should be accepted as conclusive * * *' See, also, *Virginia* v. *Tennessee*, 148 U. S. 503, 523; *Maryland* v. *West Virginia*, 217 U. S. 1, 41-44; *Vermont* v. *New Hampshire*, 289 U. S. 593, 613.

"In *Michigan* v. *Wisconsin*, 270 U. S. 295, 308, the Court thus referred to the recognition of this principle in international law, saying: 'That rights of the character here claimed may be acquired on the one hand and lost on the other by open, long-continued and uninterrupted possession of territory, is a doctrine not confined to individuals but applicable to sovereign nations as well, *Direct United States Cable Co.* v. *Anglo-American Telegraph Co.*, (1877) L. R. 2 A. C. 394, 421; Wheaton, International Law, 5th Eng. Ed., 268-269; 1 Moore, International Law Digest, 294 *et seq.*, and, *a fortiori*, to the quasi-sovereign States of the Union.' "

The above decision demonstrates what this Court has repeatedly recognized: namely, that proof of long acquiescence in the exercise of dominion and sovereignty over disputed territory is of the highest importance in a controversy between sovereigns. It is submitted that matters of such importance may properly be pleaded by a sovereign State.

IV

There Is No Legal Basis for Plaintiff's Motion. The Cases Cited in Plaintiff's Motion Are Not Applicable

In view of the fact that there are no rules of pleading specifically applicable to this proceeding, there is, we submit, no legal basis whatever for plaintiff's motion.

Counsel for plaintiff have cited some thirty decisions, all of which defendant's counsel have carefully examined. To review them would unnecessarily prolong this reply. It can be said, however, that not a single one of the decisions cited constitutes authority, even under conventional rules of pleading, for striking out an answer containing affirmative defenses of the character of those pleaded in the present answer. Most of these cases simply involve the violation of some specific rule of appellate practice.

Stevens v. *The White City*, 285 U. S. 195, is a typical example. Here the court merely charged a party with costs for printing unnecessary parts of a record on appeal in violation of Rule 13, par. 9. It is difficult to see how such cases as these "point to the impropriety of the State's answer" in the present case. Plaintiff has not cited one decision involving a suit where it was necessary to plead recognition, acquiescence, long usage, estoppel and a long chain of title. Not one of the decisions cited involved an original suit in the Supreme Court between sovereigns.

The case of *Virginia* v. *West Virginia* is mentioned,[35] not as authority for counsel's motion, but in an attempt to distinguish the Court's ruling in that case. This attempt consists in the unsupported and unexplained assertion by counsel that the relaxation of technical rules of pleadings in favor of a sovereign, held proper by this Court in the *Virginia* case, "will promote confusion that will enhance the possibility of error in the case at bar." Counsel do not say how it will promote confusion or enhance the possibility of error for the Court and counsel to be advised in detail what defendant intends to offer to prove and what it considers the basis of its title.

Counsel cite the case of Richard Mylward, decided in 1596, as indicating the attitude of the English Chancery Courts towards pleadings of inexcusable prolixity in private litigation. But counsel misstate even this case. The farcical punishment described in the case was inflicted because Mylward unduly extended his pleading "of a malicious purpose to increase the defendant's charge."[36] The note in Volume 5 of Holdsworth, to which counsel refer, also mentions that the same Chancellor "ordered pauper plaintiffs who had sued without cause to be whipped

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[35] Memorandum in Support of Motion to Strike, p. 8.

[36] Monro, *Acta Cancellariae* 692.

* * * and committed a defendant to the Fleet for inserting scandalous matter * * * in a bill * * *."

It is respectfully suggested that a wholesome antidote to this medieval conception of legal procedure will be found in the words of Mr. Justice Holmes, speaking for this Court, in the case of *Virginia* v. *West Virginia,* 220 U. S. 1, 27:

> "The case is to be considered in the untechnical spirit proper for dealing with a quasi-international controversy, remembering that there is no municipal code governing the matter * * * Therefore we shall spend no time on objections as to multifariousness, laches and the like, except so far as they affect the merits, with which we proceed to deal."

V

There Is an Amplitude of Precedent for the Answer Filed Herein

Examination of the records in this Court of the cases wherein a sovereign state has been the defendant discloses that there are precedents in the answers filed therein for the inclusion in the answer of a defendant state of all the various kinds of allegations which are objected to herein, including "citations to and quotations from court decisions, administrative rulings and legal and historical treatises," "evidentiary material," and "conclusions of law and fact," as well as "maps, exhibits and isolated excerpts from what appear to be letters, deeds and other instruments."[37]

In those cases wherein the defendant pleaded its long-continued possession or assertions of ownership, together with inaction, acquiescence, waiver, admissions by conduct or by declarations against interest, or estoppel on the

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[37] Memorandum in Support of Motion to Strike Answer, pp. 1, 2.

part of the plaintiff, the facts relied upon to support those defenses were set forth in great detail. The difference between those answers and the answer herein arises from the circumstance that the facts available to support those defenses herein are vastly greater in number than were available to the defendants in those earlier cases. For illustration, see the answers filed in the following cases:

Maryland v. *West Virginia,* No. 1, 1911 Term (wherein the answer, with its appendix, occupies 487 pages and includes a long and detailed historical recital from the beginnings of the Virginia Colony to date, including numerous quotations and excerpts from various historical, legal and administrative documents, reports, maps, etc.);

Vermont v. *New Hampshire,* No. 2, 1936 Term (wherein the answer, 75 pages in length, likewise sets forth many historical matters and includes the full text or excerpts therefrom *in haec verba* of some fifty different documents, including statutes, legislative resolutions, congressional resolutions, reports of committees, letters, proceedings in Congress, proceedings in the state legislature, etc.).

Among other cases in which the answers contained similar matters, though less in quantity, are *Rhode Island* v. *Massachusetts,* No. 3, 1845 Term, and *Arkansas* v. *Tennessee,* No. 9, 1940 Term.

Conclusion

As plaintiff's motion to strike is not based upon any ground of irrelevancy or immateriality, or on any ground of legal insufficiency, counsel for defendant have purposely refrained from briefing these issues in this reply brief. Should the Court consider that such questions are pertinent to this motion in connection with the defenses pleaded in the answer, defendant then desires and requests an oppor-

tunity of presenting authorities on those questions in a separate brief.

It is respectfully submitted that the motion to strike should be denied.

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